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No. 92-635

In The
Supreme Court of the United States
October Term, 1992

KEVIN FIDEL ROBINSON,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

MARY SUE TERRY
Attorney General of Virginia

*EUGENE MURPHY
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624
Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

WHETHER PETITIONER HAS PROVIDED ANY REASON WARRANTING THIS COURT'S REVIEW OF THE VIRGINIA COURTS' FACT-BOUND DETERMINATION THAT NO *DOYLE* ERROR OCCURRED IN THIS CASE?

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JURISDICTION

This Court's jurisdiction is grounded upon 28 USC § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are set forth in the Petition for Writ of Certiorari at vi.

STATEMENT OF THE CASE

On July 12, 1990 in the Circuit Court of the County of Chesterfield petitioner was convicted of entering a banking house armed with a deadly weapon and robbery. On August 19, 1990 he was sentenced to a total of twenty-five years imprisonment.

The Virginia Court of Appeals affirmed the convictions in an unpublished opinion on March 10, 1992. (App. 1-10).[1]

The Virginia Supreme Court denied an appeal therefrom on June 16, 1992. (App. 14-15).

STATEMENT OF FACTS

On January 25, 1990, as Thomas Hudson was entering a bank in Chesterfield County, he observed the petitioner standing outside. (App. 1). The petitioner was not disguised in any way and was carrying a briefcase under his arm. (App. 2). After Hudson had entered the bank, the petitioner entered and robbed the bank. (App. 2). Although the petitioner was then wearing a mask, Hudson could identify him because he was wearing the same clothes and carrying the same briefcase. (App. 2). When the petitioner left the bank after the robbery, Hudson followed him in his own car. (App. 2-3). He saw the petitioner getting into the get-away car. (App. 3).

In court Hudson made a positive identification of the petitioner as the man he had seen standing outside the

[1] References are to petitioner's appendix.

bank and later getting into the get-away car. (App. 2-3). He also identified Debbie Falden, petitioner's girlfriend, as the driver of that car. (App. 7).

Another witness had observed a man resembling the petitioner throw a briefcase under a tree in her front yard located near the bank. (App. 3). The briefcase contained bullets, car keys and $909, the sum of money which had been taken from the bank during the robbery. (App. 3).

Debbie Falden testified that she had driven the petitioner, who was carrying a briefcase, to the bank. (App. 3). When petitioner later emerged from the bank and ran by her with the briefcase, he was being followed by a car. (App. 3). After riding around the neighborhood, she found and picked up the petitioner who immediately said that "it didn't work." (App. 3).

The petitioner's former girlfriend, Debbie Falden, testified against him at trial. Petitioner then testified in his own behalf. During closing argument defense counsel stated that Ms. Falden may not have been telling the truth because she was attempting to avoid going to prison. In his rebuttal argument the Commonwealth's Attorney restated defense counsel's argument and replied:

> The problem with that is that you really can't judge her by that standard because the reason she is going to prison is because she told the truth when she wasn't in jeopardy. This doesn't place her in jeopardy. She is already in jeopardy. Everything she said here today is after she has been charged, after she has been – after she is subject to life and after she already told the same thing to somebody else. Kevin Robinson stands in different shoes. Because you see Kevin

> Robinson stands to go to the penitentiary and everything he said today is the first time and everything he said today determines whether he goes or not, so to suggest –

(App. 35). At that point the prosecutor was interrupted by a motion for a mistrial which was denied.

REASONS FOR DENYING THE WRIT

I. The Prosecutor's Comment Did Not Involve Any Infringement Of The Petitioner's Fifth Or Fourteenth Amendment Rights.

Petitioner argues that a comment made by the Commonwealth's Attorney during closing argument infringed his Fifth Amendment right to remain silent and his right to due process. He has provided, however, no "special and important" reason warranting certiorari review. *See* Rule 10.1. A mere claim that the court below erred in applying *Doyle v. Ohio*, 426 U.S. 610 (1976), is insufficient to merit certiorari review. *See Ross v. Moffitt*, 417 U.S. 600, 616 (1974). The prosecutor, moreover, never made any comment on the exercise of petitioner's right to remain silent after being advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Any indirect reference thereto was insufficient to constitute a Fifth Amendment violation.

In responding to defense counsel's attack on Falden's testimony, the prosecutor merely stressed that the petitioner had more reason than Falden to fabricate his testimony because she had already incriminated herself. Moreover, there was no evidence before the jury that the

petitioner had been warned or questioned by the police. In the absence of any evidence that Robinson received *Miranda* warnings and invoked his right not to speak to the police, there could not have been a *Doyle* violation. *See Fletcher v. Weir*, 455 U.S. 603, 607 (1982).

The prosecutor did not argue that the petitioner's testimony at trial was unworthy of belief because he had failed to give the same explanation to the police. As a consequence, this case is clearly distinguishable from *Doyle*.

In *Doyle* the prosecution made clear to the jury that the defendants had been given *Miranda* warnings, were questioned by the police and had not told them the story which they presented at trial. The prosecutor was even permitted to ask the following questions:

> "[I]f that is all you had to do with this and you are innocent, when [the police officer] arrived on the scene why didn't you tell him."
>
> "But in any event you didn't bother to tell [the police officer] anything about this?"
>
> "But you didn't protest your innocence at that time?"

426 U.S. at 614 and n. 5. Additionally the prosecutor told one of the defendants that "[I]nstead of protesting your innocence, as you do today, you said in response to a question of [the police officer], 'I don't know what you are talking about.' " 426 U.S. at 614 n. 5. Nothing remotely similar occurred in the instant case.

Petitioner also argues that the Virginia Court of Appeals applied the wrong standard for determination of

harmless error after a *Doyle* violation. The Virginia Court of Appeals, however, never addressed harmless error because it concluded that there had been no *Doyle* error: "a single comment which only vaguely and indirectly referenced the defendant's post-arrest silence, does not violate *Doyle*." (App. 8-9). The Court went on to hold:

> [Robinson] was not cross-examined with respect to his failure to relate any alibi to police. The Commonwealth's Attorney merely argued to the jury that Falden had already admitted her participation in the crime and had "been charges,: [sic] while everything [petitioner] said today is the first time." The jury may not have even related this isolated comment to defendant's post-arrest silence. Clearly, however, it did not "so infect" the trial with unfairness that the ultimate conviction "constituted a denial of due process." (App. 9-10).

(App. 9-10).

In any event, the evidence against the petitioner was overwhelming and any possible *Doyle* error was harmless. *See Chapman v. California*, 386 U.S. 18 (1967).[2] The petitioner was identified by a citizen eyewitness who had seen him without his mask outside the bank before and after the robbery. That witness followed the petitioner and observed him getting into a vehicle driven by Falden.

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[2] Because no *Doyle* violation occurred in this case, and because, if error occurred, the *Chapman* standard of harmless error has been satisfied, this Court's granting of certiorari in *Brecht v. Abrahamson*, 112 S.Ct. 2937 (1992), has no bearing on this case. The issue in *Brecht* is whether a "lesser" standard of harmless error should be applied to *Doyle* errors.

Falden testified that she had driven the petitioner to and from the bank. Moreover, the briefcase which petitioner had carried into the bank and discarded in the neighborhood of the bank was found to contain the money stolen from the bank during the robbery. In view of the strength of this evidence, the matter about which Robinson complains is clearly *de minimis*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARY SUE TERRY,
Attorney General of Virginia

*EUGENE MURPHY,
Assistant Attorney General

*Counsel of Record

November 25, 1992